several States.[17] A more recent statute in England provides that any surrender shall cause a subtenant to hold directly from the landlord,[18] and at least one State has reached the same result without legislative assistance, on the ground that there is no merger.[19] In another jurisdiction it has been held that when the lessee along with his surrender makes an assignment of the underlease the subtenant will be liable to the landlord, since the intention of the parties is to sever the rent from the reversion.[20] It is to be hoped that these qualifications upon the common law rule are forerunners of its total abolition in favor of the more logical and equitable view which, while securing the subtenant in his occupation of the land, also protects the reciprocal obligations which he should fairly assume in return for that occupation.

INTENTION AS AN ELEMENT IN THE CREATION OF A FIXTURE.—At early common law the law of fixtures was briefly summarized in the maxim, *Quicquid plantatur solo, solo cedit*[1]. But, like other arbitrary legal rules, this inflexible test proved ill adapted to a developing industrial life, particularly in view of the rapidly increasing importance of personal property, so that there has been a gradual relaxation of the original harsh though simple rule[2]. The modern test of a fixture which has proved most satisfactory and has been most widely adopted is that pronounced in the leading case of *Teaff* v. *Hewitt*[3], which makes the status of an annexed chattel as a part of the realty depend upon three things: actual annexation to the realty, or something appurtenant thereto[4]; appropriation to the use or purpose of that part of the realty with which it is connected; and the intention of the party making the annexation to make the article a permanent accession to the freehold. This intention is to be inferred from the nature of the article affixed, the situation of the person making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made[5]. The marked tendency of the later decisions is to emphasize intention as the predominant factor in the creation of a fixture, and to regard the other elements as subsidiary, valuable chiefly as evidence of the presumable intention of the annexer[6]. As the intention requisite to make a chattel part of

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[17]1 Rev. St. N. Y. 744 § 2; 2 Underhill, Landlord & Tenant, § 709.

[18]8 & 9 Vict. ch. 106 § 9.

[19]See Hessel *v.* Johnson (1889) 129 Pa. 173; see also Kedney *v.* Rohrbach (N. Y. 1886) 14 Daly 54; but see McDonald *v.* May *supra.*

[20]Beal *v.* Boston Car Spring Co. (1878) 125 Mass. 157; *cf.* Brownson *v.* Roy (1903) 133 Mich. 617.

[1]Stillman *v.* Hamer (Miss. 1843) 7 How. 421; Ewell, Fixtures, (2nd ed.) 77.

[2]1 Reeves, Real Property, § 10.

[3](1853) 1 Oh. St. 511.

[4]There may also be a constructive annexation. This exists when the chattel is not physically attached to the realty, but is appropriated to it and is reasonably necessary to its beneficial use and enjoyment. A door key is a good example.

[5]*Cf.* Hopewell Mills *v.* Bank (1890) 150 Mass. 519; Bank *v.* North (1894) 160 Pa. 303.

[6]Barringer *v.* Everson (1906) 127 Wis. 36; Hill *v.* Sewald (1866) 53 Pa. 271; Capen *v.* Peckham (1868) 35 Conn. 88; 7 COLUMBIA LAW REVIEW 1; Ewell, Fixtures, (2nd ed.) 30.

the realty must be presumed from the circumstances surrounding the annexation, settled rules of law have evolved, based upon an inference of intention drawn from the facts which ordinarily exist in the situation in question. Thus it is held that a mortgagor cannot remove articles annexed to the land subsequently to the mortgage without the consent of the mortgagee[7]; for it is presumed that the mortgagor, who is the equitable owner of the property, intended that the annexation should be for the benefit of the freehold. On similar grounds there is a greater presumption that an annexed chattel is part of the realty as between executor and heir, or vendor and vendee, than as between landlord and tenant[8]. The test of intention in the creation of fixtures, however, does not seem to have been extended to cases where a trespasser has annexed chattels to the land, for it is universally held that such chattels become fixtures, without, apparently, any regard to the intention of the annexer[9].

The importance of the intention of the annexer is well illustrated when he has provided by contract that the annexed chattel shall remain personalty. Such a stipulation is decisive as between the parties to the contract, but the question is more difficult when the interests of third persons are involved. In the recent case of *Equitable Guarantee & Trust Co.* v. *Hukill* (Del. 1912) 85 Atl. 60, a mortgagor leased the premises to a tenant, and agreed that the latter should be permitted to remove the trade buildings at any time before the termination of the lease. It was held that the tenant might remove the buildings even as against the mortgagee[10], and this result seems correct, for the latter could claim the chattels only upon the theory that they became part of the realty, and the contract shows clearly that such was not the intention of the annexer[11]. This conclusion is supported by the weight of authority, the decisions being frequently based upon the equitable ground that the mortgagee has no claims to security in which he has placed no reliance[12]. This view is subject to certain limitations, however, as that the chattel shall not have been so affixed that its legal identity is destroyed, or that its removal would so injure the freehold as to constitute an impairment of the mortgagee's original security[13]. But one court has held that a chattel may be removed despite injury to the land, if the diminution in the mortgagee's

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[7]Winslow *v.* Merchants Ins. Co. (Mass. 1842) 4 Metc. 306; Walmsley *v.* Milne (1859) 7 C. B. [N. S.] 114.

[8]Tift *v.* Horton (1873) 53 N. Y. 377; Union Bank *v.* Wolf Co. (1905) 114 Tenn. 255; Capen *v.* Peckham *supra.*

[9]Henderson *v.* Ownby (1882) 56 Tex. 647; 2 Tiffany, Landlord & Tenant, § 238; but *cf.* Ewell, Fixtures, (2nd ed.) 86.

[10]The analogous questions which may arise between the land mortgagee and the chattel mortgagee or conditional vendor are determined by the same rules as those governing the rights of the mortgagee and the tenant.

[11]*Cf.* Belvin *v.* Raleigh Paper Co. (1898) 123 N. C. 138; Ship Co. *v.* McCann (1891) 86 Mich. 106; Boston Trust Co. *v.* Bankers' Tel. Co. (1888) 36 Fed. 288.

[12]Paine *v.* McDowell (1898) 71 Vt. 28; Campbell *v.* Roddy (1888) 44 N. J. Eq. 244; Cox *v.* New Bern Lighting Co. (1909) 151 N. C. 62; Davis *v.* Bliss (1907) 187 N. Y. 77. The case of McFadden *v.* Allen (1892) 134 N. Y. 489 may be distinguished on the ground of estoppel.

[13]See Ford *v.* Cobb (1859) 20 N. Y. 344; Hershberger *v.* Johnson (1900) 37 Ore. 109.

security caused by the injury is made good[14], and this seems logically correct and not at all inequitable. The doctrine of the principal case, however, has been vigorously opposed in some jurisdictions, notably in Massachusetts, where it has been held that since the mortgagor himself has no right to remove annexed chattels against the wishes of the mortgagee, he cannot grant such a right to anyone else[15]. This argument seems based on the arbitrary rule of the common law[16], disregarding the intention of the parties, for otherwise it is clear that the presumable intention of a mortgagor who himself annexes property to the realty is different from the intention of a tenant who makes the annexation under a contract permitting him to remove the chattel. Moreover, the result of the Massachusetts rule seems to be grossly inequitable to the tenant, and to unnecessarily restrict the use of the land.

RIGHT OF A COMMON CARRIER TO LIMIT ITS LIABILITY.—The responsibility of a common carrier for property intrusted to it for transportation, not only embraces the ordinary liability for negligence of a bailee for hire, but also constitutes the carrier a virtual insurer of the goods.[1] Common carriage being a matter of vital importance, public policy forbids one engaged in this service from absolving himself from liability for wilful negligence, even by a contract otherwise valid.[2] It is not considered, however, that public policy demands such an uncompromising attitude toward the broader phase of the carrier's liability, and as a man may bargain away his common law rights,[3] contracts relieving the carrier of its responsibility as an insurer against accidental loss are compatible with public policy.[4]

While the stipulation usually contained in contracts of shipment, fixing the amount recoverable for loss or injury to goods shipped, may lawfully operate to limit the carrier's liability as insurer,[5] there is a conflict in the authorities as to the effect of such a limitation when the carrier's negligence has caused a loss. One view classifies the contract as an agreement exempting the carrier from liability for negligence, and holds partial exemptions and total exemptions equally intolerable.[6] This was the conclusion reached by a majority of the court in the recent case of *J. M. Pace Mule Co.* v. *Seaboard Air Line Railway Co.* (N. C. 1912) 76 S. E. 513, in which the contract of shipment fixed the

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[14]Campbell *v.* Roddy *supra.*

[15]Clary *v.* Owen (1860) 81 Mass. 522; Meagher *v.* Hays (1890) 152 Mass. 228; Fuller-Warren Co. *v.* Harter (1901) 110 Wis. 80; Young *v.* Chandler (1906) 102 Me. 251.

[16]Butler *v.* Page (Mass. 1843) 7 Metc. 40.

[1]Ala. etc. R. R. Co. *v.* Little (1882) 71 Ala. 611.

[2]R. R. Co. *v.* Lockwood (1873) 84 U. S. 357; but see Zimmer *v.* N. Y. C. & H. R. R. R. Co. (1893) 137 N. Y. 460; Holsapple *v.* Rome etc. R. R. Co. (1881) 86 N. Y. 275.

[3]2 Wyman, Pub. Serv. Corp., § 1002.

[4]Ala. etc. R. R. Co. *v.* Little *supra;* see Ry. Co. *v.* Wynn (1889) 88 Tenn. 320; Ruppel *v.* Allegheny V. Ry. (1895) 167 Pa. 166; Greenwald *v.* Weir (N. Y. 1909) 130 App. Div. 696.

[5]Ala. etc. R. R. Co. *v.* Little *supra;* see R. R. Co. *v.* Lockwood *supra.*

[6]Moulton *v.* St. P. etc. Ry. Co. (1883) 31 Minn 85; Ry. Co. *v.* Wynn *supra.*